

DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

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FILE: B-209562**DATE:** January 31, 1983**MATTER OF:** E. J. Nachtwey**DIGEST:**

1. Protest that awardee did not meet definitive responsibility criteria concerning education, experience, and capacity is denied where awardee submitted "Qualifications Statement" from which contracting officer could reasonably conclude that criteria had been met.
2. Whether contractor is performing in accordance with the contract terms is a matter of contract administration for resolution by the contracting agency, not GAO.

E. J. Nachtwey protests the award of a contract to Deane M. Meyer under invitation for bids (IFB) No. R92-82-94-N issued by the United States Department of Agriculture (Agriculture), Region 9, Wisconsin, for music instruction. Mr. Nachtwey contends that Mr. Meyer lacks the expertise necessary to comply with the solicitation requirements.

The protest is denied in part and dismissed in part.

Four bids were submitted at the bid opening. They were:

1. Douglas Tomnay	\$ 9,000
2. E. J. Nachtwey	9,396
3. Deane M. Meyer	9,600
4. David A. Dall	13,500

Mr. Tomnay's bid was rejected because he did not meet the educational requirements contained in paragraph 140 of the solicitation. Mr. Nachtwey's bid was rejected as non-responsive because he would not work on Tuesday and Thursday evenings. The contract was awarded to Mr. Meyer, the third low bidder.

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Mr. Nachtwey does not contend that his bid was responsive. He protests that Mr. Meyer lacks the qualification required to meet the solicitation requirements. Had we known all the facts prior to receipt of the agency report, we would have dismissed the protest because, even if Mr. Nachtwey's contention is correct, he would not be in line for award. The contract would instead be awarded to Mr. Dall, the fourth bidder. Although Mr. Nachtwey contends all bids are unqualified, he fails to specify why Mr. Dall's bid is unacceptable. See International Business Investments, B-202164.2, June 8, 1981, 81-1 CPD 459, in which we held that a fifth low bidder is not an interested party when there is at least one other firm to whom award could be made.

We nevertheless conclude, on the basis of our examination of the agency report and Mr. Nachtwey's comments, that the protest is without merit.

The solicitation requires the development of a musical program for the instruction of Corpsmen enrollees. The program is to include vocal and instrumental instruction for the following instruments: guitars, drums, trombones, cymbals, trumpets, saxaphones, accordians, violins, harmonicas, and the use of amplifiers. Mr. Nachtwey contends Mr. Meyer is incapable of instructing anything other than guitar because he lacks the education and experience required by the following paragraph of the solicitation:

"140 - Qualifications

"Instructor must have a music degree or equivalent from a special music school and experience in bands. Also must know how to conduct music for band."

The protest relates to Mr. Meyer's responsibility, that is, his capacity to perform the contract. Our Office does not review affirmative determinations of responsibility unless fraud on the part of procuring officials is shown or the solicitation contains definitive responsibility criteria which allegedly have been misapplied. Watch Security, Inc., B-209149, October 20, 1982, 82-2 CPD 353. Definitive responsibility criteria are specific and objective standards established by an agency for a particular procurement for the measurement of a bidder's ability to perform the contract.

The special standards limit the class of bidders to those meeting specified qualitative and quantitative qualifications necessary for adequate contract performance, e.g., minimum experience requirement. Proficiency Associates, Inc., B-198844.2, January 19, 1981, 81-1 CPD 29; Haughton Elevator Division, Reliance Electric Company, 55 Comp. Gen. 1051 (1976), 76-1 CPD 294.

In our view, the requirement that the instructor know how to conduct music is not sufficiently specific and objective to be considered a definitive responsibility criterion. Gaffny Plumbing and Heating Corporation, B-206006, June 2, 1982, 82-1 CPD 521. We therefore will not review Mr. Meyer's responsibility under this requirement.

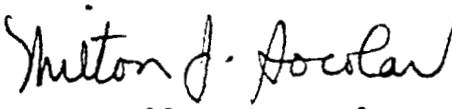
However, the requirement that the instructor "have a music degree or equivalent from a special music school and experience in bands" is more specific and is arguably a definitive responsibility criterion. Assuming, arguendo, that it is, our review is limited to determining whether Mr. Meyer has submitted evidence from which the contracting officer could reasonably conclude that the definitive responsibility criterion had been met. Johnson Controls, Inc., B-200466, February 20, 1981, 81-1 CPD 120.

Mr. Meyer submitted a "Qualifications Statement" with his bid which listed the "Southwest Guitar Conservatory" among his educational qualifications. He also indicated that he has been teaching a class in beginning guitar at Nicolet College, Rhinelander, Wisconsin, and is currently playing with the "Neon Rainbow" band from Clintsville, Wisconsin. While we appreciate Mr. Nachtwey's concern, the contracting officer could reasonably conclude from this evidence that Mr. Meyer has "a music degree or equivalent from a special music school and experience in bands." This ground of protest, accordingly, is denied.

Mr. Nachtwey has submitted a copy of a notice announcing Mr. Meyer's classes. The notice does not refer to vocal instruction or Sunday classes. He contends the notice proves Mr. Meyer is not presently complying with the contract terms. We will not consider this allegation. The question of whether a contractor is performing in accordance with the

contract terms is a matter of contract administration and will not be considered by our Office. Dyna-Cote Ind., Inc., B-208543, September 8, 1982, 82-2 CPD 211.

Mr. Nachtwey's protest regarding the misapplication of the educational and band experience requirement is denied. The other grounds of protest are dismissed.


for Comptroller General
of the United States